DISTRICT COURT FINDS THAT MINOR HAD AUTHORITY TO CONSENT TO SEARCH OF THE DEFENDANT'S CELL PHONE

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In United States v. Gardner, 2016 WL 5110190 (E.D. Mich. September 21, 2016), the United States District Court for the Eastern District of Michigan held that a minor possessed the authority to give law enforcement officers consent to search Defendant Michael Taylor Gardner's cell phone. As a result, the District Court denied Gardner's motion to suppress the evidence obtained from the search of his cell phone. The relevant facts are as follows.

On October 10, 2015, Officer Justin Forrest was working undercover as part of the Southeastern Michigan Crimes Against Children monitoring a website. Officer Forrest located an advertisement on the website from a person describing herself as "Jewel–18." The photographs in the advertisement allegedly depicted Minor Victim One ("MV-1").

Officer Forrest called the telephone number listed on the website advertisement and spoke with a female on at least three occasions. Officer Forrest, then, arranged to meet MV-1 at a Red Roof Inn in Warren, Michigan. Officers who were conducting surveillance at the motel saw a Ford Explorer arrive at the Red Roof Inn with several passengers. MV-1 got out of the car; however, Gardner and others remained in the car. MV-1 called Officer Forrest to notify him that she had arrived at the Red Roof; the two met in the lobby and, then, went up to the room. MV-1 was carrying a cell phone, which she says she needed for security reasons, but she did not have any identification on her. After Officer Forrest and MV-1 exchanged money and agreed on the terms of a sex date, other officers entered the room. MV-1 was taken into custody and provided with Miranda warnings. Although she initially stated that she was over eighteen, MV-1 was later identified as a seventeen-year-old juvenile. MV-1 was in possession of the phone at issue in Gardner's motion to suppress when she was arrested.

Detective Brian Shock provided MV-1 with a consent form to search the phone. Detective Shock advised MV-1 that she could refuse to consent to the search. However, Detective Shock also advised MV-1 that law enforcement would seek a warrant if she refused to consent to the search and that obtaining a warrant could delay the return of the phone. Finally, Detective Shock told MV-1 that,

if she consented to the search, the phone would be returned to her that night. MV-1 testified during the evidentiary hearing that she consented to the search because she wanted to get the phone back that night and that she feared that, if law enforcement kept the phone longer, Gardner would "put his hands on [her]." Gardner was not present during or aware of MV-1's consent to search the phone.

MV-1 believes that she told the officers that the phone belonged to her boyfriend and that he was outside of the hotel room. Neither of the two officers who testified at the evidentiary hearing recalled hearing MV-1 state that the phone was not hers or that the phone belonged to her boyfriend. Detective Shock recalled that MV-1 said "she was there with somebody" and that "their name was Mike and that he dropped her off." Both Detective Shock and Sergeant Larissa LaMay stated that, had MV-1 informed them that the phone was not hers, they would have taken efforts to identify the owner, would have obtain a search warrant, and would not have had MV-1 fill out the consent form. Ultimately, the contents of the cell phone were downloaded while MV-1 was processed and interviewed at the Southfield, Michigan, police station. At the end of the night, MV-1 was released, and the cell phone was returned to her.

Meanwhile, during the time the officers were in the hotel room with MV-1, other officers approached the Ford Explorer that MV-1 arrived in and detained the vehicle's occupants, including Gardner. Gardner and the other three occupants were interviewed. Each of the men in the car had a cell phone, except Gardner, who Sergeant LaMay testified told the officers that he had a black cell phone in the back seat. Sergeant LaMay stated that all three of the men with cell phones claimed ownership of their respective phones and gave consent to search the phones. The officers never recovered a phone in the back seat of the vehicle that Defendant said belonged to him.

Search of the cell phone at issue revealed that, for a period of several weeks leading up to October 10, 2015, Gardner and MV-1 were both using the phone, although Gardner seemed to be the owner and primary user of the phone during this period. Prior to this period, Gardner used the cell phone almost exclusively. The search also revealed naked photographs of MV-1; a phone text conversation between MV-1 and Gardner discussing MV-1's age; proof that the cell phone user had contacted the website that Forrest had been monitoring and motels in the vicinity of the arrest; and a number of text messages from the days leading up to October 10 that were exchanged with commercial sex customers discussing rates and specific acts.

On February 19, 2016, law enforcement officers arrested Gardner and seized the cell phone in question. Law enforcement officers, then, obtained a search warrant for the phone based on information from the October 10 search of the phone, publicly available Facebook images, and Gardner's October 2015 interview. Gardner was charged with one count of sex trafficking of children and with one count of production of child pornography. The Government indicated that it intended to use evidence obtained from the search of Gardner's cell phone and social media accounts at trial. Gardner moved to suppress the evidence obtained from his cell phone as fruits of an illegal search, arguing that officers lacked probable cause to obtain a search warrant and to search his cell phone.

The District Court began its analysis by noting that the Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," such that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Id. The District Court further noted that a defendant seeking to suppress evidence based upon a Fourth Amendment challenge must show that he had a "legitimate expectation of privacy" in the place or objects searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). This requirement is twofold in that the defendant must have exhibited an actual subjective expectation of privacy, and that expectation must be one that society recognizes as reasonable. Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring). If the defendant successfully shows that he had a reasonable expectation of privacy in the place or object searched, the burden shifts to the government to establish that the search was either performed pursuant to a valid warrant or that the warrantless search fell within one of the few specifically established and well-delineated exceptions to the warrant requirement. Id. at 357.

In this case, the District Court found that law enforcement officers properly searched Gardner's phone pursuant to the valid third-party consent given by MV-1. In reaching this conclusion, the District Court noted that the United States Supreme Court has held that citizens, like Gardner, maintain an expectation of privacy in one's cell phone that society has recognized as being reasonable. Riley v. California, 134 S. Ct. 2473, 2488-89 (2014). The District Court further found that Gardner had a personal expectation of privacy in his cell phone based upon the fact that he maintained a passcode on his cell phone and that he changed the passcode regularly.

Nevertheless, the District Court explained that a third-party may give consent to a search of another's property if that third-party does so unequivocally, specifically, intelligently, and with the authority to do so. The District Court found that MV-1 voluntarily and freely gave law enforcement consent to search Gardner's cell phone. Even though she was a minor, MV-1 did not lack education, was not of low intelligence, and understood her constitutional rights.

Furthermore, the District Court found that MV-1 had both actual and apparent authority to give law enforcement consent to search Gardner's cell phone. The District Court explained that, in order for a third-party to possess actual authority to consent to a search, the third-party must have either (1) mutual use of the property by virtue of joint access or (2) control for most purposes of the property. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). Here, Gardner's cell phone number was used to advertise on the website monitored by Officer Forrest, and Officer Forrest spoke to MV-1 on three occasions using that phone number to arrange for a commercial sex date. Moreover, MV-1 possessed the cell phone when she met Officer Forrest at the motel, and she used the phone to notify Officer Forrest that she had arrived at the motel. Notably, MV-1 knew the cell phone's passcode, and she provided the passcode to the officers when she gave consent to search the cell phone. The District Court concluded that these factors demonstrated that MV-1 had actual authority to give consent to search the cell phone.

In addition, the District Court held that MV-1 had apparent authority to give officers consent to search Gardner's cell phone. The District Court stated that even when a third-party consent comes from an individual without actual authority over the property searched, there is no Fourth Amendment violation if the police conduct the search in good faith reliance on the third-party's apparent authority to authorize the search through consent. "Apparent authority is judged by an objective standard. A search consented to by a third party without actual authority over the premises is nonetheless valid if the officers reasonably could conclude from the facts available that the third party had authority to consent to the search." United States v. Gillis, 358 F.3d 386, 390 (6th Cir. 2004).

The District Court found that MV-1 had apparent authority because the cell phone was in her possession, and she had complete access to it, including the passcode to open it. Based on these facts, the District Court concluded that officers reasonably could conclude that MV-1 had authority to consent to the search, and this apparent authority remedied any constitutional error that would otherwise result from a warrantless search. Accordingly, the District Court denied Gardner's motion to suppress the evidence obtained as a result of the search of his cell phone.

Law enforcement must remember that they may conduct a search without violating the Fourth Amendment if they obtain consent for the search from either the property owner or from a third-party with authority to give consent for the search. If law enforcement is relying upon a third-party for the consent, that third party must provide knowing, voluntary consent, and the third-party must possess either actual authority or apparent authority to consent to the search.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*